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A. M. Gulas

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ESSAY

“Does the allocation of power between the federal and state governments and among the branches of the federal government contribute to the preservation of individual liberty and the functioning of our government?”*

Implicit within the question presented are several queries which must be answered in order to reply. First of all, we speak of the allocation of power without knowing where the power originates. If it comes from the federal government, it seems inconceivable that the government of the Union should surrender part of its authority to the states. We must also understand what allocation of power has taken place, that is, which government and its various branches possesses what responsibilities and limitations. Finally, we must see the effects allocations of power have on the functions of the governments as well as on the liberties of the governed.

Presently, on one of the major television networks there is a nightly series of historical anecdotes entitled “We the People. . . .” It popularizes the first three words of the preamble of the United States Constitution by telling biographical summaries about individuals, past and present, who have added considerably to the richness of our American heritage. The phrase “We the People” has a singularly awesome sound when it is understood within the context of the Constitution. It means that the power of the government belongs to the people, the governed, and is delegated to the government “to secure the blessings of liberty to ourselves and our posterity.” It is necessary to acknowledge that the power flows from the people before a discussion can be made of the allocations involved.

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Political theorists during the Revolutionary era were well versed in the philosophies of Thomas Hobbes, David Hume, John Locke, and Charles de Montesquieu. But it was Locke's theory of social contract which provided the basis for the Declaration of Independence. Lockean theory proposes that men leave the state of nature and form a civil society to secure their rights.¹ Locke defined political power as "that power which every man having in the state of nature has given up into the hands of society" with the implied or explicit trust that such power be used "for their good and the preservation of their property."² In this manner, government is seen as "a device by which individual men can protect their own life, liberty and property;"³ and it is the "civil law, which must permit flexible and continuing development as society changes, [that] primarily governs relationships between individuals."⁴

The notion that the ultimate authority resides in the people alone⁵ was at the heart of the Declaration of Independence. Indeed, the alleged absolute monarchy from which the colonies declared independence was inconsistent with civil society; for it is the purpose of civil society to "avoid and remedy" the inconveniences of man being the judge in his own case which exists in the state of nature, or results from the dominion of an absolute prince.⁶ With authority vested in the people, government becomes a "public thing" — *res publica* or republic — which is conducted for the interest and benefit of the people, rather than the ruler.⁷

During the Revolutionary era state governments were able to produce a stabilizing force, in contrast to the disruption caused by the struggle for independence, by adopting state constitutions.⁸ Many state constitutions contained a declaration of rights, or bill of rights, which limited the power of the state government to infringe upon the natural rights of the citizens.⁹ After independence and peace were

1. David F. Epstein, *The Political Theory of the Federalist*, 108 (1984).

2. John Locke, *The Second Treatise of Government*, 97 (Thomas P. Peardon ed. 1952).

3. Epstein, *supra* note 1 at 3.

4. *Western Pa. Socialist Workers v. Connecticut General Life Ins. Co.*, ___ Pa. ___, 515 A.2d 1331, 1336 (1986).

5. Madison, *THE FEDERALIST*, No. 46, 315 (Jacob E. Cooke ed. 1961) [hereinafter all citations to *THE FEDERALIST* are to this edition].

6. Locke, *supra* note 2 at 50-51.

7. Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution*, 69 (6th ed. 1983).

8. *Id.*

9. *Western Pa. Socialist Workers*, 515 A.2d at 1334.

won it soon became apparent that the loose confederation of states would possess insufficient stability to maintain the status. Proponents for a new government of the Union argued, "[m]en want the blessing of living under stable laws on which they can depend; and this blessing partly depends on the energy by which a good government can defeat dangers to stability."¹⁰ The convention held at the Philadelphia State House, May through September, 1787, was originally thought to be for the purpose of strengthening the Articles of Confederation which had been penned by the Second Continental Congress.¹¹ However, men such as James Madison and Alexander Hamilton saw the necessity of building a new government, of writing a new constitution, predicated on the belief that "the people. . . can claim a right to rule."¹²

Acknowledging that the authority of government is inherently in the people is the first step to understanding the allocation of powers. James Madison explained the second step in *The Federalist* when he wrote: "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments."¹³ For, as we can see, the state and federal governments are "but different agents and trustees of the people" delegated different powers to be used for designated purposes.¹⁴ Since the base of both governments is the people, "[t]he government of the Union, like that of each state, must be able to address itself immediately to the hopes and fears of *individuals*.. . ."¹⁵ Both Madison and Hamilton recognized that one of the weaknesses of the Confederation was that the central government only had power over the states or "collective bodies."¹⁶ This resulted in the "wheels of the national government. . . [coming] to an awful stand" because the thirteen sovereign wills refused to execute the measures of the Union.¹⁷ A government can only expect compliance with its laws if

10. Epstein, *supra* note 1 at 114.

11. See generally James Madison, *Journal of the Federal Convention*, 29-51 (E.H. Scott ed. 1970). [hereinafter cited as *Journal*.]

12. Epstein, *supra* note 1 at 153.

13. Madison, *THE FEDERALIST*, No. 51, at 351.

14. Madison, *THE FEDERALIST*, No. 46, at 315.

15. Hamilton, *THE FEDERALIST*, No. 16 at 102-103. (emphasis added.) Noah Webster expressed the same sentiments in the winter of 1784-1785. Madison, *Journal*, *supra* note 11 at 44.

16. See generally *THE FEDERALIST*, No. 15 at 89-98 and No. 45 at 308-14.

17. Hamilton, *THE FEDERALIST*, No. 15 at 98. See also Madison, *Journal*,

it has the power to compel obedience, that is, if its laws are viewed as more than mere advice.¹⁸ The two forms of compulsion are generally seen as the sword and the milder coercion of the executive.¹⁹ The sword works best against collective bodies, as was seen in the Civil War; but the mild influence of the executive is aimed at the individual since there is no expectation of a real struggle once the executive "manifests its majesty."²⁰

Once it is recognized that the powers of the state and federal governments flow from the people, the next consideration requires a look at the powers delegated to the distinct governments. It is generally understood that the federal government is supreme in matters of foreign affairs.²¹ This is evident: from the prohibition in article I, section 10 on states entering into any treaty, alliance, or confederation; from the guarantee in article IV, section 4 that the United States shall protect each state from invasion; and from the language of article II, section 2 paragraph 2, granting the executive the power to make treaties with approval of two-thirds of the national senate. The federal government also regulates commerce between and among the several states and foreign nations,²² provides for the general welfare,²³ restrains states from certain injurious acts,²⁴ and possesses that power which is necessary and proper to carry out its functions.²⁵ Hamilton proposed the novel concept that the government

supra note 11 at 47. "As a natural consequence of this distracted and disheartening condition of the Union, the Federal authority had ceased to be respected abroad, and dispositions were shown there, particularly in Great Britain, to take advantage of its imbecility, and to speculate on its approaching downfall." *Id.*

18. Epstein, *supra* note 1 at 38.

19. *Id.* [Author's note: Hamilton referred to the office as that of "magistrate" but described it as the "proper executor of the laws" meaning what we today acknowledge as the executive branch.]

20. *Id.*

21. *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936) (The Union, declared by the Articles of Confederation to be perpetual, was the sole possessor of external sovereignty).

22. U.S. CONST. art. I, § 9. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (The relative inquiry is to whether the activity to be regulated is commerce involving more than one state and having a genuine and substantial relation to the national interest).

23. *Buckley v. Valeo*, 424 U.S. 1 (1976) (It is for Congress to determine which expenditures are necessary for the public welfare).

24. THE FEDERALIST, No. 41, 269. *See* U. S. CONST. amend XIV.

25. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) construing U.S. CONST. art. I, § 8. Madison concurred: "whenever a general power to do a thing is given, every particular power necessary for doing it is included." THE FEDERALIST, No. 44 at 304-305.

of the Union is a limited government in that it possesses the powers specifically enumerated, yet argued that "[t]hese powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.*"²⁶ Hence, there exist broad implied powers within the "necessary and proper" clause.

Although it would appear there remains little for the states to do, Madison explained that the "powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state."²⁷ It was left to the states to govern "the violations of rights and breaches of duties between individuals" through the existence of civil law, both common and statutory.²⁸ Thus, we see the states retaining the purpose for which men originally created the body politic: the protection of "their lives, liberties, and estates."²⁹

The second part of Madison's description of the allocation of power between state and federal governments is the apportionment of each into distinct and separate departments. This allocation has come to be known as the concept of separation of powers.³⁰ For, as Madison warned, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."³¹ Use of the concept of the separation of powers makes the laws applicable to the law-makers. Each legislative grant of power to the executive is permission to act in a prescribed way. If the executive can only use the power given to him, and the legislature can grant power but cannot use it

26. Hamilton, *THE FEDERALIST*, No. 23 at 147. (Italic in original).

27. Madison, *THE FEDERALIST*, No. 45, at 313.

28. *Western Pa. Socialist Workers*, 515 A.2d at 1336.

29. Locke, *supra* note 2 at 71. Madison regarded the creation of political society for the purpose of protecting men's "faculties." A man's faculty included his talents and labor by which he was able to acquire property. Epstein, *supra* note 1 at 74. Locke understood property to mean "property which men have in their persons as well as goods." Locke, *supra* note 2 at 99.

30. *Immigration & Naturalization Service v. Chada*, —U.S.—, 103 S. Ct. 2764, 2781 (1983) (Section 244(c) of the Immigration & Naturalization Act which authorizes one House of Congress to pass a resolution invalidating a decision of an agency of the executive branch is unconstitutional).

31. Madison, *THE FEDERALIST*, No. 47, at 324.

itself, the citizens have little need to fear the government,³² since it would not be possible - as it would in the hands of an absolute monarch - to have the power to enact tyrannical laws and to execute such laws in the same hand.³³ This is not to say that the actions of the branches cannot result in an overlap of powers. For example, the Senate acts as a judiciary when it impeaches, and the judiciary "makes law" when it decides cases or controversies. What must be avoided is "the *whole* power of one department [being] exercised by the same hands which possess the *whole* power of another department" or the "fundamental principles of a free constitution" will be subverted.³⁴

Once governments are divided into separate branches it is necessary to avoid the gradual concentration of power into one department by giving each the constitutional means to resist the encroachments of others.³⁵ "Ambition must be made to counteract ambition; [t]he interest of the man must be connected with the constitutional rights of the place."³⁶ Such a check and balance system is necessary when a government is administered by men over men because a society must first enable a government to control the governed, then oblige it to control itself.³⁷

So far the discussion has centered on how the structure of the federal and state governments prevent abuse of political liberties. The next query is into the effect of the allocation of powers on individual or civil liberties. Recall that Locke proposed all men are free, equal and independent in the state of nature,³⁸ and it was to avoid the inconvenience of each man enforcing the laws of nature

32. Epstein, *supra* note 1 at 129-30.

33. Madison, THE FEDERALIST, No. 47, at 326-27. Madison surveyed the State constitutions and found very similar allocations of power, often with more stringent prohibitions. For example, the Massachusetts articles of liberty declare "that the legislative department shall *never* exercise the executive and judicial powers, or either of them. . . ." *Id.* at 327 (emphasis added).

34. *Id.* at 325-26 (emphasis in original).

35. Madison, THE FEDERALIST, No. 51, at 349. See *INS v. Chada*, 103 S. Ct. 2764 (1983), wherein the INS joined Chada in arguing the contested section was unconstitutional. See also *Bowsher v. Synar*, ___U.S. ___, 92 L. Ed.2d 583 (1986).

36. Madison, THE FEDERALIST, No. 51, at 349. [Author's note: No doubt, Chief Justice John Marshall's initiative in the enunciation of the doctrine of judicial review in *Marbury v. Madison* was precisely what Madison had in mind.]

37. Madison, THE FEDERALIST, No. 51, at 349.

38. Locke, *supra* note 2 at 4-5. Thomas Jefferson borrowed this concept for the Declaration of Independence: "We hold these truths to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."

which resulted in men forming a political society and surrendering the right to be governed to the body politic.³⁹ Yet the individual liberties men possessed in nature were never surrendered. They remain inherent in men to be preserved by the governments of the Union and the states.⁴⁰ Juxtaposed with the natural rights inherent in man is the idea of a fundamental law, a law of the land, "to which all official and governmental action was bound to conform. . . [which] could be invoked against officials by anyone aggrieved."⁴¹ American constitutional guarantees of liberty "are precepts of the law of the land," and "violations of these secured liberties. . . involve defiance of fundamental law."⁴² As Justice T. C. Clark once warned: "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."⁴³

Along with the allocations of power to the federal and state governments are prohibitions on the use of the power granted which are contained in the federal Bill of Rights and the state constitutions. Initially, a few of the Federalists opposed the Bill of Rights as redundant, since, as a government of delegated powers, the Union was already limited as to what it could do.⁴⁴ However, Madison considered it politically vital to draft the bill and avoid the Constitution's opponents assembling another convention and undoing what had been accomplished.⁴⁵ Originally, the draft prepared by Madison and the House of Representatives would have restricted both the federal and state governments.⁴⁶ States' rights advocates in the Senate succeeded in altering the amendments to apply to the federal government only.⁴⁷ It was not until the passage of the fourteenth amendment that many of the prohibitions on governmental action were found to apply to the states. It was, at best, a gradual restriction.

39. Locke, *supra* note 2 at 50-51.

40. *Western Pa. Socialist Workers*, 515 A.2d at 1335.

41. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, 61 (1957). Pound compares the Continental legal tradition based on the Justinian codification system which believed law proceeded from the ruler, with the English system which believed the ruler and ruled alike were subject to a fundamental law of the land, which was ascertained rather than made. *Id.* at 9-11.

42. *Id.* at v.

43. *Mapp v. Ohio*, 367 U.S. 643 (1961). ("All evidence obtained by searches and seizures in violation of the Constitution is. . . inadmissible in a state court.")

44. Kelly, *supra* note 7 at 121.

45. *Id.*

46. *Id.*

47. *Id.*

However, by 1969, nineteen of the twenty-six provisions in the Bill of Rights were incorporated into the due process clause of the fourteenth amendment.⁴⁸

The guarantees of liberty applicable to the federal and state authority not only protect the individual from unwarranted governmental intervention, but can likewise protect the minority from the impulse of the majority. Federalist theory recognizes that the "majority has no right to sacrifice other men's rights to their interests."⁴⁹ Madison wrote extensively on this problem.⁵⁰ "Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."⁵¹ By faction, Madison meant "a number of citizens. . . united. . . by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁵² The republican form of government best controls the effects of faction since the great and aggregate interests are referred to the national government and the local and particular are referred to the state.⁵³ It follows then that prohibitions on either state or federal actions protect the minority from actions of the majority who would use the governmental power for their advantage to the detriment of the minority.

The allocation of power between the federal and state governments and among the branches of the federal government contribute to the preservation of individual liberty and the functioning of government by providing a republican form of government predicated on the notion of popular rule through representation. Representation permits the voices of the local and the aggregate to be heard and provides for the recognition of the concerns of both majority and minority. Thus, the structure of the government provides the greatest protection of political liberties. The limitations and prohibitions on the actions of the government protect the citizens from unwarranted intrusions into their private lives as the government carries out its functions of

48. Kelly, *supra* note 7 at 648.

49. Epstein, *supra* note 1 at 86.

50. See generally Madison, THE FEDERALIST, No. 10, at 56-65.

51. *Id.* at 56.

52. *Id.* at 57.

53. *Id.* at 63.

protecting civil society from transgressions of its laws and the punishment of transgressors. This is, in fact, the reason for which men entered into civil society.

A.M. Gulas

